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Nos. 82-226 and 82-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner

v.

AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents

AMERICAN PAPER INSTITUTE, INC.,
Petitioner

v.

AMERICAN ELECTRIC POWER SERVICE CORP., *et al.*,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case originated as a challenge by three electric utilities (the "Electric Utilities")[1] to four rules promulgated by the Federal Energy Regulatory Commission (the "FERC" or the "Commission"). The Commission issued those rules pursuant to the portions of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617 ("PURPA") which deal with cogeneration and small

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[1] The Electric Utilities are American Electric Power Service Corporation and Consolidated Edison Company of New York, Inc., two investor-owned utilities, and Colorado-Ute Electric Association, Inc., a cooperative system. The listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each of the Electric Utilities required by Rule 28 is set forth in Appendix A.

power production.[2] Of the four rules challenged, the Court of Appeals vacated two and upheld two.

PURPA was part of a comprehensive legislative package designed to address the national energy crisis. As this Court noted in *FERC v. Mississippi*, —— U.S. ——, No. 80-1749, slip op. (June 1, 1982) at 2, Congress determined that conservation of oil and natural gas by electric utilities was essential to the success of any effort to achieve three goals: to lessen national dependence on foreign oil, to avoid a repetition of the shortage of natural gas that had occurred in 1977, and to control costs to the consumers of electric power. Because Congress believed that promotion of "qualifying" cogeneration and small power production would reduce the demand for oil and natural gas by electric utilities, and thereby promote these three goals, Congress enacted Sections 201 and 210 of PURPA, 16 U.S.C. §§ 796, 824a-3 (Supp. IV 1980). See *id.* at 6.

Section 201 amends Section 3 of the Federal Power Act (the "FPA") by adding definitions of "qualifying" cogeneration and small power production facilities. These definitions required the Commission to establish criteria, consistent with statutory standards, governing which cogeneration and small power production facilities would be eligible for the benefits conferred by Section 210 of PURPA.

Section 210(a) of PURPA directs the Commission to promulgate rules requiring electric utilities to offer to sell electric energy to, and to purchase electric energy from, qualifying facilities. Section 210(b) sets forth the standards which are to govern the rules promulgated by the FERC concerning the rates at which utilities are to purchase electric energy generated by qualifying facilities. Among these standards are the requirements that the rates for such purchases "shall be just and reasonable to

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[2] Two pertinent provisions of PURPA, Sections 201 and 210, were amended by Section 643 of the Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611, 770 (June 30, 1980). The amendments are not relevant to any of the issues in this case.

the electric consumers of the electric utility and in the public interest. . . ." Under Section 210(f), the FERC's rules are then to be implemented by the states, which are to set rates for such purchases in accordance with those rules.

Section 210(e) of PURPA directs the Commission to promulgate rules pursuant to which qualifying facilities would be exempted, in whole or in part, from the FPA and certain other applicable state and federal laws and regulations. Section 210(e)(3) provides, however, that no qualifying facility may be exempted from the provisions of Sections 210 and 212 of the FPA, provisions which govern interconnections with utilities and which were added to the FPA by PURPA.

The four rules challenged by the Electric Utilities were:

(1) The "purchase rate rule," 18 C.F.R. § 292.304, Pet. App. B-111 to B-114,[3] which mandated that the states set rates for purchase of electric energy by a utility from qualifying facilities at a level equal to the utility's "full avoided" (or full incremental) cost. This rule would allocate all of the economic benefits of the transaction to the cogenerator and none to the consumers of the utility.

(2) The "interconnection rule," 18 C.F.R. § 292.303(c), Pet. App. B-110, which obligated electric utilities on a blanket basis to interconnect with qualifying facilities, exempting those facilities from the substantive and procedural requirements of Sections 210 and 212 of the FPA. By failing to apply those requirements to particularly sensitive interconnections, the Commission abandoned the federal interest in the reliability and integrity of the national network of electricity grids which the statute seeks to protect.

(3) The "simultaneous purchase and sale" or "simultaneous transaction rule," 18 C.F.R. § 292.304(b)(4), Pet. App. B-112, by which a utility is deemed,

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[3] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-34.

at the cogenerator's option, to have purchased at full avoided cost all the electricity produced by the cogenerator, whether or not any of that power is made available to the utility.

(4) The definition of a "qualifying cogeneration facility," 18 C.F.R. §§ 292.203, 292.205, Pet. App. B-169 to B-172, which failed to include any fuel use test among the criteria governing qualifying status for oil- and gas-fired projects. In so doing, facilities which will increase the nation's use of oil and natural gas will receive the benefits of PURPA and will thereby be encouraged, contrary to the statute's basic purpose of reducing national dependence on these fuels.

A unanimous panel of the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey, vacated the purchase rate, or full avoided cost, rule and the interconnection rule; the court affirmed the simultaneous transaction rule and the Commission's failure to include a fuel use test in its definition of a "qualifying cogeneration facility."[4] On the Commission's petition for rehearing and suggestion for rehearing *en banc* concerning the full avoided cost and interconnection rules, the original panel of Chief Judge Robinson, and Judges Wilkey and Ginsburg unanimously voted to deny, while Judges Wald and Mikva voted to hear the case *en banc*.[5]

Both the FERC (Docket No. 82-226) and the American Paper Institute, Inc. ("API") (Docket No. 82-34), an intervenor in the court below, seek review by this Court of the decision vacating the full avoided cost and interconnection rules.[6] Since the questions they present and

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[4] Pet. App. B-1 to B-34.

[5] Pet. App. B-202 to B-208. Circuit Judges Wright, Tamm, MacKinnon, Robb, Edwards and Bork did not participate.

[6] API's effort to cast doubt on the jurisdiction of the Court of Appeals (which it first made to the court below on rehearing) to review those of the challenged rules issued under Section 210, rather than

the arguments they raise are essentially similar, the Electric Utilities hereby file a single opposition to the two petitions.

SUMMARY OF ARGUMENT

In enacting Title II of PURPA, Congress devised a carefully balanced program that sought to foster the development of cogeneration and small power production with the objective of saving oil and gas resources and as a means of moderating the rising costs of power to consumers. Congress provided, *inter alia*, that electric utilities should purchase surplus power from qualifying cogenerators (and small power producers) at rates that satisfy three specific criteria—the public interest, the interests of consumers of electric utilities and the interests of cogenerators.[7] However, in no event could those rates exceed the incremental cost to the utility of generating additional power (known as the full avoided cost). In particular, Congress specified that these rates be *the lower of* a "just and reasonable" rate and the full avoided cost.

In addition Congress authorized the FERC to order interconnections between, *inter alia*, qualifying facilities and electric utilities when the parties fail to agree on

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under Section 201, of PURPA because the former section is not an amendment to the Federal Power Act, is mistaken. (API Pet. 4, n.3). First, as the Commission found in its Order on Rehearing, Section 210 itself incorporates the judicial review provisions of the FPA, providing in Section 210(h) that for enforcement purposes, the FERC's rule herein "shall be treated as a rule under the Federal Power Act." Pet. App. B-177-78, n.2. Second, the rules issued under the two sections of PURPA are "interrelated" and "the issues will be more clearly delineated, and the task of separating interrelated sections will be obviated, if these rulemakings are subject to review in the same forum." FERC Order on Rehearing, Pet. App. B-178, n.2, citing *ECEE, Inc. v. FERC*, 611 F.2d 554, 564-65 (5th Cir. 1980).

[7] Cogenerators and small power producers which qualify for the benefits of PURPA are referred to herein both as "qualifying facilities" and, more generally, as "cogenerators."

the terms of such interconnection. This authority, Sections 210 and 212 of the FPA, specifies the criteria to be weighed, the procedures to be followed, and of key significance, the safeguards to electric utility consumers to be heeded in ordering such interconnections. Of prime importance is the provision of Section 212 that requires that the interconnection be designed so as not to impair the safety and reliability of the national network (or "grids") of electricity transmission.

Judge Wilkey, in a carefully balanced opinion joined by Judges Robinson and Ginsburg, considered four challenges to rules adopted by the FERC implementing the cogeneration and small power production provisions of PURPA. The court below upheld the Commission on two of the challenges. However, the Court of Appeals found that the Commission had disregarded statutory criteria in promulgating two aspects of those rules, and thereby had disregarded the limitations and requirements to which Congress directed that those rules must conform.

The Court of Appeals vacated the full avoided cost rule, which would direct all of the benefits of transactions between cogenerators and utilities to the qualifying facilities, leaving no opportunity for utility customers to share in those benefits.[8] As Judge Wilkey held:

> [Congress] specified the three other criteria [other than the limitation that rates never exceed full avoided cost]—in the 'public interest,' and the interests of cogenerators and 'electric consumers of electric utilit[ies]'—which the Commission was to consider in setting rates. It is apparent that the Commission did not do this, or at least if it did its rationale and process of consideration was never made explicit.

Pet. App. B-9.

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[8] The full avoided cost rule would cause rates for electricity to be higher than they would otherwise be. The higher the rates a utility pays to cogenerators, the higher will be the utility's costs, and hence the higher will be the rates it charges its customers.

The court therefore vacated the full avoided cost rule and remanded for further consideration. It did not say that on remand the Commission could not adopt a full avoided cost rule, but merely held that whatever rule it adopts, the FERC must explain how that rule fulfills the statutory criteria which prescribe the bounds of its rule-making power. Moreover, the Court did not invalidate the rule on the basis of any procedural infirmity or impose on the FERC any procedural requirements to be followed on remand.

The Court of Appeals also vacated the FERC's interconnection rule that would exempt qualifying facilities from the safeguards Congress enacted as part of PURPA to insure that the sensitive interconnections between these facilities and utilities would not threaten the safety, integrity and reliability of the national network of electricity grids. The FERC adopted this rule in spite of the express direction in Section 210(e)(3)(B) of PURPA that qualifying facilities not be exempted from these safeguards. Judge Wilkey's decision found "that this rule is inconsistent with the statutes." Pet. App. B-22.

The decision of the Court of Appeals vacating the interconnection and full avoided cost rules stands for the unassailable proposition that administrative agencies must confine their actions within the bounds set by Congress and that agencies must give a concise general statement of a rule's basis and purpose adequate to enable the courts to perform their task of judicial review. The decision conflicts with no decision of this Court, nor with the decision of any court of appeals. No novel legal question was raised before the Court of Appeals, and no novel legal question was decided by that court. Furthermore, the disposition by the Court of Appeals of both issues was legally correct.

Moreover, the decision of the Court of Appeals does not cast doubt on the FERC's ability to promulgate regula-

tions that would fully and effectively implement the statutory program. Nothing in that decision would frustrate the will of Congress. Quite the contrary, the Court of Appeals properly vacated the interconnection and full avoided cost rules precisely to insure that the program will proceed as it was envisioned by Congress. Review by this Court will needlessly exacerbate the delay in implementing the program (attributable to the illegality of the Commission's rules) of which the Petitioners complain. In short, this case provides no reason for this Court to exercise its review authority.

ARGUMENT

A. The Decision of the Court of Appeals Vacating the Full Avoided Cost Rule Was Correct, And Is Not Worthy of Review by This Court.

1. *The Review Exercised By the Court of Appeals Was a Limited and Wholly Appropriate Exercise of the Court's Review Function.*

The full avoided cost rule would deprive utility customers of all of the benefits of transactions with cogenerators and reserve every penny of those benefits to qualifying facilities. Petitioners seek to persuade that the Court of Appeals took some unusual action, resting on an unsound doctrinal basis, in vacating this rule. Examination of Judge Wilkey's opinion and of the opinion of the court below on rehearing discloses just the opposite. Not only did the Court of Appeals break no new ground, nor impose any unwarranted standard of review, but the court's review of the avoided cost rule was in fact a highly circumscribed holding well within the scope of judicial review of an agency's action which is claimed to conflict with a statutory mandate.

The FERC's petition avers that the Court of Appeals' "hostility to the full avoided cost rule appears to rest, at least in part, on the notion that the Commission lacks au-

thority to adopt such a rule, whatever justifying reasons it might proffer." (FERC Pet. 18). The Commission thereupon launches its attack on the decision as if the court below had in fact held a full avoided cost rule to be flatly illegal.

The Court of Appeals did no such thing. The court expressed its holding in clear and limited terms: "We hold that FERC has not adequately justified its adoption of the full avoided cost standard. Therefore the FERC rule is vacated and remanded to the Commission." Pet. App. B-9. Judge Wilkey's opinion could not be clearer that the holding below was no more than that the Commission had failed to provide an explanation for how a rule which *seems*, on its face, to conflict with the statute is "consistent with the statutory criteria." Pet. App. B-10. As the opinion explained in finding the Commission's conclusory defense facially inadequate, "The Commission may be right in its conclusion, but it needs to make its reasoning and findings explicit." Pet. App. B-11.

The Court of Appeals underscored the limited nature of its holding in its opinion on rehearing, stating that it "simply remanded the matter because the Commission had failed to explain 'its rationale and process of consideration.' " It characterized "the central point made by the court" as being "that FERC never bothered to present a cogent justification of its rule in light of the statutory instructions." Pet. App. B-203-04, citing the original opinion at Pet. App. B-9 to B-12. Even though the rule *appears* to conflict squarely with the statute's commands, the Court of Appeals expressly left open the possibility that the FERC could provide a justification of the full avoided cost rule that satisfies the statutory criteria.

In so doing, the Court of Appeals did not, as the FERC now charges, "substitute its judgment for that of the Commission." (FERC Pet. 21). Nor did it apply a "substantial evidence" test in reviewing the rule, as both

the FERC and API contend. The argument of these parties that the Court of Appeals engaged in an inappropriate judicial interference with agency action reflects a misunderstanding of what was before the court.

The issue for the Court of Appeals was whether the full avoided cost rule, as promulgated and justified by the FERC, is "consistent with the statutory criteria." Pet. App. B-10. As explained below, the standards which Congress enacted in Section 210 of PURPA require the Commission, *inter alia*, to balance the interests of qualifying facilities and utility customers in setting a purchase rate rule. By setting this rate in all cases at the maximum the statute permits in any case, the rule evades (or, at a minimum, appears on its face to evade) the statutory standards, the Congressional directive that the Commission balance the specified interests.

The question, then, is not whether the agency properly exercised its discretion, since no agency has discretion to ignore statutory commands. Instead, the question is one of statutory construction. This is a traditional judicial function to which such standards as "substantial evidence" and "arbitrary and capricious," by which the scope of review of an agency's exercise of discretion is described, are simply not pertinent.

These standards would be relevant to the question of the court's review function had the Commission explicitly balanced the interests of qualifying facilities and utility ratepayers as required by statute and had it adequately explained the rationale for its conclusions.[9] By refusing to permit electric utility customers to receive *any* of the benefits of purchase transactions, the Commission failed

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[9] The FERC could, for example, have demonstrated a balancing of interests by presumptively setting the purchase rate at 75% or 85% of avoided cost while leaving a cogenerator the freedom to establish that in its particular circumstance it warrants a greater share of the transaction's benefits (for example, where the cogenerator intends to rely on an innovative but inherently risky technology).

to consider whether rates would be "just and reasonable" to those customers and removed the issue on review from one of discretion to one of its adherence to statutory command. In reviewing that question, the Court of Appeals exercised circumspection and restraint, finding that the Commission appears not to have adhered to the statutory commands, but giving it the opportunity to adopt the same rule on remand if it can then "present a cogent justification of its rule in light of the statutory instructions." Pet. App. B-204.

Just how limited was the scope of the review engaged in by the Court of Appeals emerges clearly from consideration of the decision as a whole. In addition to vacating two of the Commission's rules, the court sustained the Commission on both the simultaneous transaction and fuel use issues. In so doing, Judge Wilkey's opinion deferred heavily to the Commission—sanctioning the Commission's right to attach extreme constructions to statutory terms.[10] When the decision below is read completely and carefully —both on the two issues raised by Petitioners and on the two issues with which they and the Court of Appeals are in agreement, it becomes clear that, contrary to Petitioners' suggestions, the court below engaged in a narrow, highly circumspect review of the Commission's actions.

The FERC asserts that the Court of Appeals "appears" to have relied on *Public Systems v. FERC*, 606 F.2d 973 (D.C. Cir. 1979), as authority for applying a "substantial evidence" standard. The court below applied no such

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[10] For example, the opinion upheld the Commission's construction, in support of the simultaneous transaction rule, that a "purchase" and "sale" between a cogenerator and a utility occurs where the cogenerator itself consumes all of the power which it generates. The court below also sustained the Commission's refusal to include fuel use criteria in the qualifications a facility must meet in order to be eligible for the benefits of PURPA—even though the effect of that refusal will be to increase the nation's use of oil and natural gas, directly contrary to the fundamental purpose of the statute.

standard. The erroneous notion that it did seems to be based on the reference of the dissenters on rehearing to the court's citation of *Public Systems* (at slip. op. 13) as "appear[ing] to assume" the application of the substantial evidence test. Pet. App. B-207, n.2. The dissenters misread Judge Wilkey's opinion, which made no mention of "substantial evidence" and cited *Public Systems*, in a footnote, for the quite different, and wholly unobjectionable, proposition that an agency has an "obligation to provide the public with the reasoned consideration, decisionmaking, and opinion which it is required to give." Pet. App. B-12. There is no dispute that an agency has such an obligation to engage in reasoned decisionmaking and to explain its actions adequately,[11] and the Court of Appeals remanded the full avoided cost rule because the FERC failed to discharge that particular obligation.

2. *The Decision of the Court of Appeals Is Correct.*

To be sure, the Court of Appeals seems to have had doubts that a full avoided cost rule could be squared with Section 210 of PURPA (although remaining open-minded and willing to give the Commission the opportunity to try to justify that rule). The court below acted correctly in vacating the rule, on the record below, as a brief examination of Section 210 shows.

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[11] *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-168 (1962). The instant case is thus very different from *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978). There, the court below had overturned a rulemaking on the ground that the procedures employed by the agency, though meeting all statutory requirements, were not those the court believed to be best suited to reaching a sound decision. This Court reversed the Court of Appeals as to that holding. In doing so, this Court did not restrict traditional judicial review of whether agency action comports with statutory commands. Indeed, this Court remanded the case back to the court below to determine whether the findings made by the agency were sustainable on the administrative record in that case. *Id.* at 549.

In Section 210, Congress directed the FERC to establish standards to guide state authorities as they in turn set rates at which utilities purchase power from qualifying facilities (so-called "purchase rates"). Those standards are that the rates not discriminate against qualifying facilities and be "just and reasonable to the electric consumers of the electric utility and in the public interest." In no event are these rates to exceed "the incremental cost to the electric utility of alternative electric energy." Section 210(b). It is this "incremental cost" maximum which the Commission's rules describe as "full avoided cost."

In the Conference Report on PURPA, Congress made clear that, as the Court of Appeals said (the emphasis being the court's), "section 210(b)'s incremental cost *limitation* is not to become a substitute for the 'just and reasonable' standard." Pet. App. B-9. As the Conference Report stated:

> [T]he utility would not be required to purchase electric energy from a qualifying cogeneration or small power production facility at a rate which exceeds *the lower of* the rate described above, namely a rate which is just and reasonable to consumers of the utility, in the public interest, and nondiscriminatory, or the incremental cost of alternate electric energy. This limitation on the rates which may be required in purchasing from a cogenerator or small power producer is meant to act as an *upper limit* on the price at which utilities can be required under this section to purchase electric energy.[12]

As the Court of Appeals explained, the standards which Section 210 sets for the Commission's purchase rate rules direct the Commission to balance the interests of qualifying facilities, utility consumers and the public. "Congress made a clear distinction between a 'just and

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[12] (Emphasis supplied). Conference Report on the Public Utility Regulatory Policies Act, H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. at 98 (1978), quoted by the court, Pet. App. B-9 to B-10.

reasonable' rate and a rate based on the full avoided cost, though the two *may* coincide." (emphasis in the original). Pet. App. B-10. As the court put it:

> Congress could have required the Commission to set rates at full avoided cost. Congress did not do so. Instead, it specified the three other criteria—the "public interest," and the interests of cogenerators and "electric consumers of electric utilit[ies]"—which the Commission was to consider in setting rates.

Pet. App. B-9.

The full avoided cost rule directs, as a rule, that *all* benefits of purchase transactions be given to cogenerators, and that *none* thereby be provided to utility consumers. Such a rule provides none of the balancing of interests and sharing of benefits with consumers which the statutory criteria require. The just and reasonable and full avoided cost standards are different, and the Commission cannot automatically equate them in all cases—at least not without a far more cogent explanation than is presented by this record. As the Court of Appeals said, "It is apparent that the Commission did not do this [consider the statute's criteria, including the 'just and reasonable' standard], or at least if it did its rationale and process of consideration were never made explicit. Instead the Commission came to the simplistic and uninformed conclusion that the full avoided cost standard would be just and reasonable in every case and that this was necessary to encourage cogeneration in every case." Pet. App. B-9.

Petitioners' only defense of the merits of the rule lies in their claim that Judge Wilkey's opinion errs because the full avoided cost rule falls within, or at the outer edge of, what is claimed to be "the congressionally established zone of reasonableness." (FERC Pet. 18-19). The flaw in this argument is that Congress did not equate the full avoided cost limitation with rates that are within a zone of reasonableness. Rather, it wrote a statute that clearly contemplates that full avoided cost will at times

exceed what is "just and reasonable" to utility consumers, and that the lower of the two is then to apply.[13]

Petitioners' mistake the "full avoided cost" limitation in Section 210(b) with a Congressionally established zone of reasonableness. However, the notion of such a zone derives not from the full avoided cost limitation, but rather from the just and reasonable standard itself.[14] As the Court of Appeals stated, "It has long been held that the essence of the just and reasonable standard is a balancing of the interests of the affected parties." Pet. App. B-10. What Congress did in enacting the "just and reasonable" and other standards of Section 210(b) was to direct the Commission to the criteria it was to employ—that is, to the factors to be balanced—in deciding where within the zone of reasonableness purchase rates should fall.

Congress did not establish the numerical locus of that zone, and so far neither has the Commission. What that zone is to be for purchase rates cannot be determined until the Commission engages in the balancing which the just and reasonable standard requires. The Commission cannot excuse its failure, as the court below said, "to consider the hard questions which the standard necessarily raises," Pet. App. B-10, by relying on one standard (the requirement that in no event are rates to exceed full avoided cost) to write out of PURPA another separate and distinct standard (that rates be just and reasonable to the electric consumers of the electric utility).[15]

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[13] *See* Conference Report, p. 98, quoted at p. 13, *supra*.

[14] *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

[15] *See American Textile Manufacturers' Institute v. Donovan*, 452 U.S. 490, 512-13 (1981). Petitioners' citation to the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), is inapposite since those cases involved review of whether or not a rate resulting from a particular balance of interests by the Commission was reasonable,

The FERC attempts to save the rule by supplying a new rationale, at this late date. That new rationale is that, despite the rule, some actual rates may be below full avoided cost. Not only is this effort of counsel to supply post-hoc rationalizations insufficient to rehabilitate agency action which was defective when taken,[16] but it is wholly unpersuasive.

The FERC cites three circumstances in which, it now claims, the harshness of the full avoided cost rule may be mitigated. The first is if a state commission were to ask the FERC to waive the rule; but, this is little comfort to a utility and its customers since they cannot even initiate this extraordinary, discretionary review. The second is if the parties were to negotiate rates below full avoided cost. That parties may voluntarily agree to forego their rights under a rule mandating payment of full avoided cost is not a defense of that rule when the statute requires that the rule adhere to a "just and reasonable" standard. In any event, that a cogenerator may accept less than its due under the rule offers limited practical benefit, since it remains free to demand what the rule provides.

The third claim is that there are "significant long-term economic savings to consumers and to the national interest in reducing dependence on imported oil." (FERC Pet. 20).[17] To the contrary, the Commission's own petition

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while this case involved review of a Commission rule which ignored the "hard questions" and failed to strike any balance at all.

[16] *See American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981).

[17] The Commission's claim that its rules will reduce national dependence on imported oil is ironic. The Electric Utilities unsuccessfully argued to the Court of Appeals that the Commission erred in refusing to include fuel use criteria in the definition of qualifying oil- and gas-fired cogeneration facilities and in failing to permit the states to take fuel use factors into account in setting purchase

recognizes that there will not, in fact, be any such economic savings. Its own explanation of the rule (quoted at FERC Pet. 21) explains that "use of the full avoided cost standard will not produce any rate savings to the utility's customers." (FERC Pet. 7). Thus, the FERC's new argument asserts the existence of potential benefits to utility customers which are nonexistent, ephemeral and irrelevant.[18]

3. *The Effects of the Court of Appeals' Decision Are Sound, and Not Adverse.*

One of Congress' purposes in enacting Section 210 of PURPA was to provide consumers with a share of the benefits of purchase transactions between cogenerators and utilities. As cost escalations have driven utility rates up, such a sharing of benefits is sound policy. In challenging the full avoided cost rule, utilities are acting on

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rates for oil- and gas-fired qualifying facilities. Whether the court below was correct or incorrect to sustain the Commission's summary disposition of the fuel use issue, the interrelated effects of that disposition with the full avoided cost rule are clear. The full avoided cost rule exacerbates the adverse effects of the Commission's failure to include fuel use provisions in its rules since it requires that all oil- or gas-fired facilities, many of which will increase the nation's use of these fuels, be paid a purchase rate at full avoided cost.

[18] Further, the FERC's argument ignores the direct and concrete harms that the rule will cause in many circumstances—which were noted by the Court of Appeals. Pet. App. B-12 to B-13. The effects of the full avoided cost rule on utility consumers are also exacerbated by the "simultaneous transaction" rule, the legality of which the Electric Utilities unsuccessfully challenged before the Court of Appeals. That rule requires the utility to pay the cogenerator for the power that it generates and consumes for itself (at full avoided, or incremental, cost) while the cogenerator pays the utility its regular rate (based on embedded rather than incremental costs) for that same power. The result is, in essence, a cash payment from the utility to the cogenerator for power which the utility does not receive.

behalf of their customers, for it is their customers and not their shareholders who will reap the benefits of lower rates should the purchase rate rule be set at something below full avoided cost. The economic dispute over the full avoided cost rule is, therefore, between cogenerators and small power producers on the one hand and, on the other, utility consumers who lack the resources or opportunity to construct qualifying facilities. Most of the anticipated cogeneration capacity will be owned by large industrial companies, such as API's members.

The Petitioners suggest that any rate below full avoided cost will be insufficient to induce the construction of worthy cogeneration and small power production projects.[19] The Court of Appeals effectively disposed of this unsupported claim: "Thus, the Commission holds that the bare, unquantified possibility that a rule permitting rates at less than full cost *might* be insufficient to encourage the last kilowatt hour of cogeneration justified shutting the utility's customers out of any share of the benefits. But this seems entirely inconsistent with the clear intent of Section 210(b), which seeks to strike a balance among the interests of cogenerators, 'electric consumers of electric utilit[ies],' and the 'public interest.'" Pet. App. B-12. (Emphasis in the original.)

The FERC claims that it will be no better able to justify a rule below full avoided cost than a rule at that 100% level. This claim is wholly incorrect, and results from the Commission's misunderstanding of the full avoided cost issue. The Court of Appeals was not reviewing an exercise of the Commission's discretion, but rather an act that seems to violate the statute. The Court of

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[19] However, a purchase rate rule not *requiring* payment of full avoided cost can *permit* such a payment in a particular case in which a state finds that such a rate is needed to induce construction of a beneficial project.

Appeals rejected the Commission's justification of the rule because the rule *appears* to conflict on its face with the statute and because the Commission "never bothered to present a cogent justification of its rule *in light of the statutory instructions.*" (Emphasis supplied.) Op. denying rehearing, Pet. App. B-204.

Should the Commission adopt a rule that provides a sharing of benefits (*i.e.*, a rule not requiring purchase rates to equal full avoided cost), the review by any appellate court will necessarily be different, and less inquisitive, than in the instant case. For, with such a rule that provides a balancing of interests, the question will not be whether the Commission strayed from the statutory framework. Rather, the question will be whether its judgment, say, to set the rate at 75% or 85% of avoided cost will have been an appropriate exercise of its discretion within the statutory framework. In fact, the Court of Appeals encouraged the Commission to consider basing purchase rates on a percentage of avoided cost, thereby providing the balancing contemplated by the statute. Pet. App. B-12. There is nothing in the opinion below that should give the Commission difficulty in promulgating a rule providing a meaningful sharing of benefits that survives judicial review.[20]

Both the FERC and API would have this Court exercise its review authority to remove uncertainties and delays resulting from the present litigation. The Electric Utilities have only sought to require the Commission to

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[20] The difficulty which the Commission fears it might have in supporting itself on remand is confined to any future effort by the Commission to justify the full avoided cost rule, and has no application to defending a balanced rule. The Commission's concern focuses on the discussion by the Court of Appeals at Pet. App. B-12 to B-16 (FERC Pet. 21). However, the Court expressly confined the discussion at these pages (which are dicta) to what it described at the beginning of that discussion as "some additional concerns raised *by the full avoided cost rule.*" (emphasis supplied) Pet. App. B-12.

enforce the law that Congress enacted. Any uncertainty and delay is unfortunate, but they are the result of the Commission's failure to promulgate a lawful rule in a timely manner. This circumstance is only temporary, and the sooner the Commission gets on with adopting a lawful rule, the sooner the cogeneration program will be fully operating in the manner Congress specified.

B. The Decision of the Court of Appeals Vacating the Interconnection Rule Was Correct, And Is Not Worthy of Review by This Court.

1. *The Rule Adopted by the FERC Cannot Be Squared With the Plain Language of the Statute.*

Sections 202 and 204 of PURPA added Sections 210 and 212 to the FPA, 16 U.S.C. §§ 824i, 824k (Supp. IV 1980). FPA Sections 210 and 212 contain procedural and substantive safeguards governing interconnections which are described in FPA Section 210(a)(1) thus:

> Upon *application of any* electric utility, Federal power marketing agency, *qualifying cogenerator, or qualifying small power producer*, the Commission may issue an order requiring—
>
> (A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of any such applicant. . . . (emphasis supplied).

FPA Section 210 thus expressly encompasses interconnections between qualifying facilities and utilities.

Section 210(e)(3)(B) of PURPA states:

> No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—
>
> . . . .
>
> (B) the provisions of section 210, 211 or 212 of the Federal Power Act. . . .

Against this statutory background, FERC promulgated rule 292.303(c)(1), which directs utilities to "make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart," exempting such facilities from the need to comply with the safeguards specified in FPA Sections 210 and 212. As the Court of Appeals found, "this rule is inconsistent with the statutes." Pet. App. B-22.

The Commission claimed to the Court of Appeals that it should have authority to order interconnections without compliance with the FPA sections. Judge Wilkey dealt with its first argument thus: "FERC argues that compliance with the literal meaning of the statutory sections would impose undue burdens upon cogenerators. However, the Commission need not impose substantial administrative burdens on those facilities, but rather can adopt streamlined procedures." Pet. App. B-23. As is discussed below, the Commission's argument that compliance with the statute will "impose undue burdens" is mistaken.[21]

The Commission then argued that it has authority, independent of FPA Sections 210 and 212, to order interconnection without compliance with those sections. The FERC seeks to imply this authority, which is not expressed in any statute, from Section 210(a) of PURPA. That section authorizes the FERC to promulgate rules relating to the *rates* utilities are to pay to cogenerators, which rules are to encourage cogeneration and small power production. By its express terms Section 210(a) of PURPA is limited to the Commission's *rate* rules; it implies no authority with respect to interconnections. In any event, even if such implied authority existed, it would not override the express limitation in Section 210(e)(3)(B) precluding the exemption of qualifying facilities

[21] The issue is not whether interconnections between qualifying facilities and utilities generally will occur—they will—but rather whether the Commission can blanketly exempt them from statutory requirements when PURPA Section 210(e)(3) expressly precludes that exemption.

from the FPA sections. Judge Wilkey rejected this effort to use what is at most a "relatively *general grant* of authority" to overcome the "relatively *specific limitation* on authority" in PURPA Section 210(e)(3)(B), holding that the general directive "does not give the Commission a mandate to consign detailed provisions of PURPA itself to the wastebasket as meaningless surplusage." Pet. App. B-24 (emphasis is the court's).[22]

The Commission then sought to justify its disregard of FPA Sections 210 and 212 by interpreting Section 210(e)(3)(B) of PURPA as restricting its authority to waive the requirements of FPA Sections 210 and 212 only when qualifying facilities are "targets" of, and not applicants for, interconnection orders.[23] The Court of Appeals found this distinction between "applicants" and "targets" bereft of support in the statute or its history and "both counterintuitive and inconsistent with the statute's explicit provisions." Pet. App. B-24 to B-25.

The Commission has never been able to explain how this distinction is pertinent to or discernible within the statute. It argues that there is a meaningful distinction between (i) the "burden" upon qualifying facilities of being targets of interconnection orders and (ii) the "benefits" whether to utilities or qualifying facilities of being able to apply for such orders. (FERC Pet. 14-15). That argument would engraft a confusing limitation on an otherwise directly phrased statute. The "burdens" and "benefits" contained in the FPA sections are inextricably

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[22] The Commission's statement of the question presented suggests that the Court of Appeals' reading of the statute requires "case-by-case evidentiary adjudications" before any interconnection can be compelled (FERC Pet. I). However, the court specified no particular procedures, whether "case-by-case evidentiary adjudications" or otherwise; and, as discussed in Part B-3, *infra*, evidentiary adjudication will in fact be required infrequently.

[23] A qualifying facility would be an unwilling "target" of an interconnection application only in the unlikely case in which a utility wanted to force it to sell power to the utility against the will of the qualifying facility.

intertwined, in that an applicant seeking interconnection can obtain that benefit only by satisfying the supposedly burdensome requirements. The artificial nature of the "burden"—"benefit" distinction is underscored by Petitioners' own argument, in which they claim that the consequence of qualifying facilities' not being exempted from what they see as the "benefit" side of the issue (being able to interconnect) is that they will thereby endure what they claim will be great procedural "burdens." Furthermore, the distinction is inherently artificial when applied to a statute referring to application for interconnection orders by both utilities and qualifying facilities since one person's benefit is often another's burden.

In fact, the statutory language is clear and simple to parse. Section 210(e)(3)(B) of PURPA precludes the exemption of qualifying facilities from Sections 210 and 212 of the FPA without qualification or distinction. And, FPA Section 210(a)(1) expressly includes qualifying facilities as applicants for interconnection orders. Had Congress wanted to limit the section's reach to qualifying facilities as targets only, it could easily have excluded them from the class of applicants. (Congress made the converse of this distinction in its treatment of Federal power marketing agencies, authorizing these agencies to apply for interconnection orders but protecting them from being posssible targets of such orders by excluding them from the list of entities in Section 210(a)(1)(A) against whom such orders could be applied.)

The Commission claims that the complexity of the statute "should have given the court of appeals pause before it substituted its own construction for that of the agency" (FERC Pet., p.16, n.11); and, API argues that the court below should have given deference to the FERC's construction. These suggestions amount to an argument that the Court of Appeals should have let stand a mistaken construction of the statute. However, as this Court has noted,

> the courts are the final authorities on issues of statutory construction, . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." . . . "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia. . . ." (citations omitted).

Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 272 (1968).[24]

The Court of Appeals concluded that the rule contradicts the plain language of the statute. In this circumstance it was obliged, under the decisions of this Court, to vacate the rule.[25] As this Court stated in *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980): "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."

2. *The Legislative History Confirms That the Intent of Congress is Consistent With the Plain Meaning of the Statute.*

The legislative history supports the plain meaning of the statute as construed by the Court of Appeals.

As initially passed by the House and the Senate, the statutory language would have directed the Commission to include in its regulations implementing what became Section 210 of PURPA "rules respecting the interconnection of a qualifying cogeneration facility to the distribu-

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[24] *See also United States v. Vogel Fertilizer Co.*, —— U.S. ——, 102 S. Ct. 821, 827 (1982); *Rowan Companies, Inc. v. United States*, 452 U.S. 247, 253 (1981), *quoting National Muffler Dealers Association, Inc. v. United States*, 440 U.S. 472, 477 (1979).

[25] *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979).

tion system of any electric utility. . . ." H.R. 8444, § 546(a)(2)[26]; H.R. 4018, § 246(a)(2).[27] The Conference Committee made two deliberate and crucial modifications. On the one hand it eliminated the legislative language which would have made interconnection one of the subjects of the Commission's regulations under PURPA Section 210; and on the other hand, it added Section 210(e), with its express prohibition against exempting qualifying facilities from, *inter alia*, Sections 210 and 212 of the FPA. By adding the non-exemption provision at the same time that it eliminated interconnection as a subject for the Commission's rules under PURPA Section 210, Congress demonstrated its intent to apply the procedural and substantive requirements of the FPA interconnection provisions to qualifying facilities that seek the benefit of interconnections.

While the Commission notes that *one* Congressional purpose in enacting FPA Section 210 was to fill a statutory gap respecting certain intrastate utilities (FERC Pet. 12-13), it does not claim that this was Congress' *only* purpose in enacting that section. The plain language of the carefully crafted statute, and its history, demonstrate the intent of Congress to further a second purpose: to establish requirements pertinent to interconnections between qualifying facilities and utilities that would insure maintenance of the safety and reliability of service to electric utility customers.[28]

3. *The Commission's Rule Fails to Give Full Effect to Congress' Purposes and Is Not Necessary to Avoid Frustration of Any Congressional Goal.*

Both the FERC and API argue that the Court of Appeals' interconnection holding "defeats the basic goal of

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[26] 95th Cong., 1st Sess. (1977).

[27] 95th Cong., 1st Sess. (1977).

[28] Had Congress only intended to fill the intrastate utility gap, it could easily have limited FPA Section 210(a) so that it did not apply explicitly to the interconnections at issue in this case.

Section 210 of PURPA." (FERC Pet. 12; API Pet. 8). As they see it, to enforce the plain meaning of the statute would so burden qualifying facilities as to discourage the cogeneration and small power production that Congress sought to promote. This argument is mistaken for two reasons: it ignores the powerful federal interest in assuring that interconnections be safe and reliable, and it constructs a false parade of horrors that makes the enforcement of the statute seem onerous when it should, in fact, be simple and unburdensome.

Congress enacted the cogeneration and small power production provisions of PURPA not as an end in itself, but to further a series of specified purposes,[29] among which was to improve the reliability of electric service. PURPA Section 2(2); *see* PURPA Section 204 (FPA Section 212(a)). Interconnections by which qualifying facilities transmit power into electricity grids are far more technically complex and sensitive than are typical customer interconnections which are only intended to enable the delivery of power from utilities to their customers. As such, the interconnections to permit qualifying facilities to transmit power to utilities *can* have a substantial adverse effect upon the reliability, integrity and safety of the highly complex network of electricity grids—leading, for example, to interruptions of service.

Protecting that interstate, indeed international, network was a federal responsibility prior to the enactment of PURPA. PURPA shares *rate* authority over wholesale sales from qualifying facilities to utilities between the FERC and the states; however, it also represents a clear congressional intent to preserve the pre-existing federal role over such interconnections.[30]

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[29] See, *e.g.*, the Statement of the Case, p. 2, *supra*.

[30] As Judge Wilkey put the matter, "FERC's argument extolling the wisdom and popularity of its interpretation [that sections 210

Petitioners would have the FERC abdicate this federal responsibility and ignore the statutory provisions governing interconnections out of a belief that to enforce FPA Sections 210 and 212 would subject qualifying facilities to onerous burdens.[31] These supposed burdens arise out of FPA Section 210(b)(2)'s direction that the Commission "afford an opportunity for an evidentiary hearing." But, Petitioners are wrong to suggest that enforcing the law might require "years of litigation to establish an interconnection" (FERC Pet. 17), for the necessary procedures can and should be simple and expeditious and only rarely require a hearing.

The Court of Appeals stated that the "Commission need not impose substantial administrative burdens on [qualifying] facilities, but rather can adopt streamlined procedures." Pet. App. B-23. Indeed, even where evidentiary hearings are required, the FERC can reasonably simplify them to a substantial degree—for example, by narrowing the issues to actual disputes of fact, by strictly confining

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and 212 of the FPA do not apply] is necessarily unavailing when Congress has explicitly chosen a policy to the contrary." Pet. App. B-23.

[31] The FERC's petition avers that enforcing these sections would subject qualifying facilities "to the very type of public utility regulation from which Congress sought to insulate them," citing the Conference Report to this effect. (FERC Pet. 16). But the language of the Conference Report which the FERC quotes (at footnote 13 at p. 16 of its Petition) does not apply to procedures to protect the national electricity grid with respect to interconnections at all; rather, the Conference Report confined that discussion of regulatory burden to the matter of *rates*, saying that "the examination *of the level of rates* which should apply to the purchase by the utility of the cogenerator's or small power producer's power should not be burdened by the same examination as are *utility rate applications*, but rather in a less burdensome manner." (emphasis supplied).

the parties to what is relevant and by commanding expedition.[32]

However, there is no reason why there should, or need, be *any* hearing in the case of the vast majority of interconnections. The statute only requires the Commission to "afford an opportunity" for a hearing.[33] This does not mandate a hearing in any case in which one is sought. Rather, as numerous decisions of this Court establish, an agency may restrict the opportunity for a hearing to those cases in which a party satisfies threshold requirements established by the agency. *See Costle v. Pacific Legal Foundation*, 445 U.S. 198, 213-15 (1980); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 620-21 (1973); *FPC v. Texaco*, 377 U.S. 33, 39 (1964); and *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).[34] There is nothing to prevent the FERC from limiting hearings to those relatively few situations in which there are genuinely disputed issues of fact material to determining whether an interconnection would satisfy the standards Congress set in FPA Sections 210 and 212.

Thus, the interpretation of the Court of Appeals does not "paralyze with one hand what [Congress] sought to promote with the other." *Clark v. Uebersee Finanz-*

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[32] Nor is the fear that a party might abuse procedures, API Pet. 9, a reason to eliminate them—especially since both the FERC and state utility commissions have adequate means to dissuade any utility suspected of such abuse.

[33] FPA § 210(b)(2).

[34] That the APA applies when a hearing must be held does not in any way restrict the FERC's right to limit the availability of a hearing to those cases in which there are *material* facts in dispute. Moreover, the determination by the agency whether there are such material facts in dispute is not subject to the substantial evidence test on review. *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 622 n.19.

Korp., 332 U.S. 480, 489 (1947).[35] Rather, it properly construes the statute, to give full effect to the integrated and comprehensive statutory scheme enacted in PURPA, including PURPA Sections 202, 204 (FPA Sections 210 and 212) and 210. And, it does so without raising any important issues of doctrine or policy that warrant review by this Court.

CONCLUSION

For the reasons set forth herein, the petitions of the FERC and API for a writ of certiorari should be denied.

Respectfully submitted,

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[35] A court is to look behind the facial meaning of a statute only in extraordinary circumstances, as when the facial meaning is "fundamentally at odds with the manifest congressional design." *United States v. Vogel Fertilizer Co.*, —— U.S. ——, 102 S. Ct. 821, 828 (1982). As the text discloses, there is no such conflict between the words of the statute and the congressional design. Should future experience with the procedures of FPA Sections 210 and 212 disclose burdens that are now not reasonably anticipated, the remedy will then be for the Congress.

APPENDIX A

Pursuant to Rule 28, the following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each of the Respondent Electric Utilities.

1. Respondent American Electric Power Service Corporation is a wholly owned subsidiary of American Electric Power Company, the affiliates and subsidiaries (except wholly owned) of which are:

Appalachian Power Company
Beech Bottom Power Company
Cardinal Operating Company
Columbus and Southern Ohio Electric Company
Indiana and Michigan Electric Company
Indiana Kentucky Electric Corp.
Ohio Power Company
Ohio Valley Electric Corp.

2. Respondent Consolidated Edison Company of New York, Inc.'s affiliates and subsidiaries (except wholly owned) are:

Honeoye Storage Company

3. Respondent Colorado-Ute Electric Association, Inc. is an association of rural electric cooperatives. The following cooperatives are members of the association:

Delta-Montrose Electric Association
Empire Electric Association, Inc.
Grand Valley Rural Power Lines, Inc.
Gunnison County Electric Association, Inc.
Holy Cross Electric Association, Inc.
Intermountain Rural Electric Association
LaPlata Electric Association, Inc.
Sangre De Cristo Electric Association, Inc.
San Isabel Electric Association, Inc.

San Miguel Power Association
San Luis Valley Rural Electric Cooperative, Inc.
Southeast Colorado Power Association
White River Electric Association, Inc.
Yampa Valley Electric Association, Inc.

Colorado-Ute Electric Association, Inc. has no other affiliates or subsidiaries (except wholly owned).